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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 266.

UNITED STATES OF AMERICA, *Petitioner,*

v.

WILLIAM A. BEAL, ET AL.

BRIEF IN OPPOSITION.

MONROE OPPENHEIMER and
ROBERT E. SHER,
1026 Woodward Building,
Washington 5, D. C.,
Attorneys for Respondent.

Of Counsel:
MILLER, SHER & OPPENHEIMER,
WILLIAM P. BERNTON,
Washington, D. C.

HARRY B. MILLER,
HARRY B. MILLER, JR.,
Lexington, Kentucky.

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BRIEF IN OPPOSITION.

William A. Beal, et al., Respondents, file this their brief in opposition to the issuance of a writ of certiorari to the Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The District Court for the Eastern District of Kentucky did not issue any opinion to accompany its order. (R. 18) The opinion of the Court of Appeals for the Sixth Circuit (R. 37) is reported at 182 F. (2d) 565.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 29, 1950. Jurisdiction of this Court is invoked by the United States under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in holding that *Armour & Co.* v. *Wantock,* 323 U. S. 126 and *Skidmore* v. *Swift & Co.,* 323 U. S. 134, required the Government, like private employers, to pay its employees time and one-half for stand-by duty.

2. Whether the Court of Appeals erred in holding that employees of the Federal Government, appointed to positions not created by an Act of Congress, are not "officers of the United States," within the meaning of 28 U. S. C. 1346(d)(2) and hence may sue the United States for salary claims in the district court of the district where they reside rather than being required to bring such action in the Court of Claims.

STATUTES AND REGULATIONS INVOLVED.

The applicable statutes and administrative regulations are adequately set forth in the Petition for Certiorari at pages 2, 3 and 14 to 22.

STATEMENT OF FACTS.

The facts in the case are adequately set forth in the Petition for Certiorari at pages 3 to 8.

REASONS FOR DENYING THE WRIT.

Summary.

As to the merits, the decision below was plainly right. The Court of Claims decision in *Conn* v. *United States* is readily distinguishable in terms of the extreme position taken by plaintiff's counsel in that case. In any event, the issue is not now of general importance as the six year Statute of Limitations (28 U. S. C. 2501) has already virtually barred any claim not already in litigation.

As to the jurisdictional issue, there is no real conflict between the decision below and the decision in *Kennedy* v.

United States (5th Cir. 1944) 146 F. (2d) 26. The decision below simply followed the elementary principle, last applied by this Court in *Burnap* v. *United States,* 252 U. S. 512, that, regardless of other factors, an "office" of the United States cannot exist unless created by some specific Act of Congress. The opinion in the *Kennedy* case did not even advert to this issue, as the parties had stipulated that the position in question had been authorized by Act of Congress.

Discussion.

1. *The decision below was correct on the merits.*

The court below held that the hours during which the plaintiff fire fighters were on call at their stations were to be counted as compensable work, and hence their hours of duty had "no aspect of irregularity or intermittency" to justify denying compensation at time and one-half for overtime. In so holding, the court followed the principle established in *Armour & Co.* v. *Wantock,* 323 U. S. 126 and *Skidmore* v. *Swift & Co.,* 323 U. S. 134.

It is true, as the Government states, that the *Armour* and *Skidmore* cases involved private employers under the Fair Labor Standards Act, while the case below involved the Government as employer under the War Overtime Pay Acts. The court below, however, concluded that this was a distinction without a difference and that this Court's reasoning under the Fair Labor Standards Act was equally applicable under the War Overtime Pay Acts. It should be here noted that after the decisions in the *Armour & Co.* and *Skidmore* cases the Civil Service Commission, without waiting for Congress to make any change in the War Overtime Pay Acts, adopted the rationale of those cases in new regulations which it applied to stand-by duty performed by government employees after the decisions in those cases were rendered. In the light of this action of the Commission, the court below correctly concluded that if, without amendment of the statutes, stand-by duty was compensable

work *after Armour & Co.* and *Skidmore* it must have been compensable work *prior* to said decisions.

The Government, in seeking certiorari, claims that the decision below is in conflict with the prior decision by the Court of Claims in *Conn* v. *United States,* 107 Ct. Cls. 422, 68 F. Supp. 966, which also involved civilian fire fighters working alternate 24-hour tours of duty requiring them to spend an average of 84 hours per week on the premises they were protecting. But, the *Conn* case involved a much different claim from that urged by the plaintiffs below. There, *Conn* argued that the entire 84 hours per week spent on the protected premises should be counted as compensable work —without even excluding the time allowed Conn for eating and sleeping. In other words, Conn asked overtime pay for 44 hours a week, including the hours during which he slept and ate his meals. Faced with this contention, the Court of Claims understandably held that to allow such a recovery would give Conn a wage increase of 165 per cent, a result it understandably felt could not have been intended by Congress.[1]

The correct principle, of course, is that announced by this Court in the *Armour* and *Skidmore* cases, supra, and adopted by the court below, i. e., that time for sleeping and eating must be deemed personal so that only 56 of each week's 84 hours on the premises were compensable. With the problem so viewed, the difficulties envisioned by the

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[1] Thus the Court said, 107 Ct. Cls. 422 at p. 460, 68 F. Supp. 966, 972: "If the plaintiffs' contention that they should be placed in the classification of employees entitled to overtime compensation at time and one-half, [were accepted] they would receive, upon the basis of their full 24-hour tours of duty an increase of 165 per centum in their pay. [Under] A similar application of the statute to lighthouse keepers and other similar groups of employees required to remain, subject to call, at their post of duty for more than 84 hours per week, which was the average number of hours in plaintiffs' tours of duty, the increased overtime compensation payable under the statute could amount to as much as 480 per centum. We do not think Congress intended such results." (The bracketed words have been supplied in order to correct the obvious typographical omissions in the opinion of the Court.)

Court of Claims disappear and the decision below becomes the only tenable one. Indeed, we believe it safe to assume that in the unlikely event that new suits should be filed (a contingency discussed below) the Court of Claims itself would adopt the rationale of the court below and distinguish the *Conn* decision on its special facts.

2. *The Statute of Limitations Has Deprived the Issue on the Merits of Any General Importance.*

Only three other suits[2] are still pending in the courts involving the validity of the regulations passed on by the court below. Accordingly, the Government's claim that the problem is still of general importance depends on the validity of the Government's estimate that there are another 12,000 to 16,000 additional claims which may "potentially" be asserted by litigation.

With all deference to the sincerity of the Government's concern, we respectfully submit that its apprehensions are wholly unrealistic, as the statute of limitations has already effectively barred all but a negligible portion of any claims upon which suit has not already been instituted. *The regulations in question* only cover the pay periods from December 2, 1942, to December 31, 1944. Hence, as of today (September 15, 1950) every one of these "potential" overtime suits has already been barred for the 96 weekly pay periods preceding September 15, 1944, leaving only the 12 pay periods, October 1, 1944 to December 31, 1944, for which suit can still be filed. Indeed, by the time the present case could be argued and decided by this Court, the six-year statute of limitations would have barred the filing of suits even with respect to these 12 weekly pay periods. It does not appear, therefore, that there is any real likelihood of the issue below assuming any such general importance as to warrant review by certiorari.

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[2] The three suits are listed at pp. 12 and 13 of the Petition for Certiorari.

3. *As to Jurisdiction.*

The plaintiffs were appointed (S. R. p. 2) under the omnibus authority of 5 U. S. C. 43, providing that:

> There is authorized to be employed in each executive department, independent establishment * * * such number of employees of the various classes recognized by the Classification Act of 1943 * * * as may be appropriated for by Congress from year to year * * *

Plaintiffs were paid under the War Department Appropriation Acts for 1943 and 1944 which made no reference to any particular offices or classes of offices but merely appropriated funds for "salaries of civilian employees."[3] Nor was there any other legislation in which the office of fire fighter is referred to or its duties prescribed. The case, therefore, is governed squarely by *Burnap* v. *United States*, 252 U. S. 512, 516. As the court below pointed out (182 F. (2d) at 568) the rule in the *Burnap* case is clear that "an office of the United States does not exist unless it is created by some specific Act of the Congress * * *"

Kennedy v. *United States*, 146 F. (2d) 26, did not go off on this issue. In that case a suit for salary was filed by a civilian instructor at an Air Force School, appointed under the omnibus authority of 5 U. S. C. 43, supra. However, the question of whether, under the doctrine of the *Burnap* case, the position was one authorized by Congress was never argued. In the District Court (54 F. Supp. 446) the parties had entered into a Stipulation of Facts eliminating any such issue by the recital that "the laws authorizing the position to which plaintiff was appointed * * * are the Military Appropriation Acts, etc. * * *" Accordingly, on appeal, the Court of Appeals for the Fifth Circuit did not even advert to the question of whether there was a law creating the office, but simply accepted the

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[3] The Military Appropriation Act of 1943 (P. L. 649, 77th Cong.); The Military Appropriation Act of 1944 (P. L. 108, 78th Cong.).

stipulation of the parties by reciting (146 F. (2d) at p. 28) "the stipulated facts show that * * * his appointment was made with the approval of the Secretary of War, acting pursuant to Acts of Congress which authorized the position to which appellant was appointed * * *"

There is, accordingly, no actual conflict between the opinion below and the opinion in the *Kennedy* case, which far from refusing to follow *Burnap* v. *United States,* was so little concerned with the issue that the Court's opinion does not even refer to the case.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this is not an appropriate case for granting certiorari.

MONROE OPPENHEIMER and
ROBERT E. SHER,
1026 Woodward Building,
Washington 5, D. C.,
Attorneys for Respondent.

Of Counsel:
MILLER, SHER & OPPENHEIMER,
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